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May 24, 2013

Hon. Margo K. Brodie
United States District Court Judge
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Sass v. MTA Bus Company
10-cv-4079(MKB)(MDG)

Dear Judge Brodie:

This office represents defendant MTA Bus Company ("MTA Bus") in the referenced employment discrimination suit. I am writing at the Court's direction to offer the legal basis for the admissibility of MTA Bus's proposed trial exhibit H, a report authored by MTA Bus's Robert Picarelli. A copy of the report is annexed to this letter memorandum.

Picarelli testified at his deposition, and is expected to testify again at trial, that his job responsibilities include "perform[ing] internal investigations for MTA Bus." Deposition of Robert Picarelli, held on January 6, 2012, at 6-7.¹ In late October of 2009 he conducted an investigation into the circumstances surrounding Sass's discovery of Nazi symbols on a bus roster sheet – which included interviews of the involved parties – and generated a report of his investigation, his conclusions and a recommendation that "appropriate action" be taken against Sass and his coworker, Totarom. Id. at 13-14, 26, 38, 43-44.

David Franceschini, MTA Bus's senior director of labor relations, reviewed the report and, based on its contents, drafted disciplinary charges against both Sass and Totarom. Deposition of David Franceschini, held on February 15, 2012, at 10, 21-22, 24, 28.² Arturo

¹A copy of Picarelli's deposition was submitted as Exhibit C in support of MTA Bus's motion for summary judgment.

²A copy of Franceschini's deposition was submitted as Exhibit D in support of MTA Bus's motion for summary judgment.

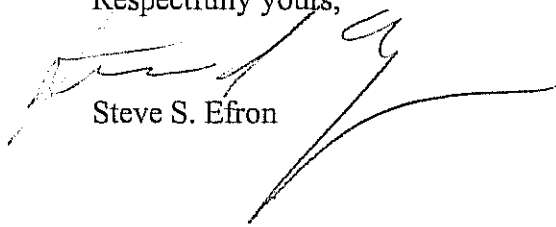
Hidalgo, the MTA Bus manager who presided over the ensuing disciplinary hearing which culminated in Sass's termination from employment, also reviewed and relied on Picarelli's report, including its recitation of witness statements. Deposition of Arturo Hidalgo, held on February 15, 2012, at 9, 14-15, 20-21.³

Picarelli can be expected to testify at trial that his report was made in the regular course of MTA Bus's business, Fed. R. Evid. 803(6), and that informants such as Totarom and Miller, whose statements are recorded in the report, were MTA Bus employees under a business duty to impart information to him. Cf. United States v. Bortnovsky, 879 F.2d 30, 34 (2d Cir. 1989).

But irrespective of whether the report qualifies in whole or in part as a business record, the hearsay rule is not implicated. "Hearsay" means a statement that ... a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801. Here, however, the Picarelli report is being offered "not for its truth, but rather to demonstrate the motivations and 'state of mind'" of Franceschini in drawing up disciplinary charges against Sass and of Hidalgo in sustaining the charges. McDonald v. City of New York, 786 F. Supp.2d 588, 598 n. 11 (E.D.N.Y. 2011). A hearsay objection simply has no validity where "defendant's internal documents and declarations ... are offered to show the state of mind of defendant's representatives in making employment decisions with regard to plaintiff." Greenidge v. Costcos Wholesale, 2012 U.S. Dist. LEXIS 45698, *3 n. 2 (E.D.N.Y. March 30, 2012); see also King v. New York City Bd. of Educ., 2000 U.S. Dist. LEXIS 18709, *21 (E.D.N.Y. Dec. 19, 2000) (rejecting hearsay challenge to admission of letters where "they were admitted as evidence of the state of mind of [defendant's representative], who made the decision to deny plaintiff tenure, and testified that she relied in part on the challenged letters").

For these reasons, MTA Bus submits that the Picarelli report, trial exhibit H, is admissible in evidence at the trial of the action.

Respectfully yours,


Steve S. Efron

SSE:s

³A copy of Hidalgo's deposition was submitted as Exhibit E in support of MTA Bus's motion for summary judgment.

Memorandum



Metropolitan Transportation Authority

Date: November 3, 2009

To: John R. Hein, Executive Vice President

From: Robert Picarelli, Chief Officer, Internal Studies & Operations Improvement

Re: Draft Report - Offensive Insignias on College Point Depot Documents

This will provide you with the results of our investigation into a report from College Point Depot General Superintendent Robert Bruno that on October 29th, Line Supervisor Ganesh Totarom (#B00048) reported that he found a document with swastikas, on a copier in the fuel station area.

Results of Investigation

1. General Superintendent Robert Bruno's Account

On October 28th, Line Supervisor Totarom advised General Superintendent Bruno that he discovered a document on the copier in the service building with improper markings.¹ General Superintendent Bruno told Line Supervisor Totarom that he wanted to see the document; however, Totarom indicated that he had to locate it. The next morning, General Superintendent Bruno found an interoffice envelope under the keyboard in his

¹ Line Supervisor Totarom was not specific in describing the markings to General Superintendent Bruno.

office. The envelope contained an undated Fuel Sheet (Attachment A) which had two swastikas on it.²

2. Line Supervisor Ganesh Totarom's Initial Account

On Friday evening (October 23rd), Line Supervisor Gary Sass told Line Supervisor Totarom that he had discovered a document with a swastika on it, on the copier in the service area. Line Supervisor Totarom examined the document that General Superintendent Bruno provided to us, and confirmed that this was the document that he left for Bruno on Wednesday evening. Line Supervisor Sass told Line Supervisor Totarom that he wanted to report this document to a manager, however there were no managers on duty at the time. Since Monday was Line Supervisor Sass' regular day off, Line Supervisor Totarom agreed to submit the document to General Superintendent Bruno on Monday. However, Line Supervisor Sass kept the document in his locker. As a result, Line Supervisor Totarom could not submit it to General Superintendent Bruno on Monday. Line Supervisor Totarom was busy on Tuesday and Wednesday, and consequently did not remember to advise General Superintendent Bruno about the document. Line Supervisor Totarom explained that in his opinion, this document did not constitute an emergency so he did not attempt to report it telephonically to management.

Line Supervisor Totarom noted that Line Supervisor Ira Lepzelter, (who he opined was Jewish) also worked the same tour as General Superintendent Bruno, and expressed concern that Lepzelter could have discovered the document and been offended.

3. Line Supervisor Gary Sass' Initial Interview

On Friday at approximately 12:30 a.m., while Line Supervisor Sass made copies, he discovered a document which contained swastikas, on the copier. Line Supervisor Sass

² This document was a rotation sheet and contained the MTA Bus and College Point Depot logos, and the words "FUEL SHEET".

unsuccessfully looked for a Superintendent to report this discovery to. Since he could not locate a manager, Line Supervisor Sass discussed the situation with Line Supervisor Totarom. Line Supervisor Totarom agreed to submit the document to General Superintendent Bruno for him on Monday.

Line Supervisor Sass discovered a similar document with swastikas, on a copier in March 2008. Line Supervisor Sass claimed to have submitted the document and an incident report to Superintendent Miller in March 2008. However, Line Supervisor Sass was not aware of Manager Miller taking any follow-up action. Line Supervisor Sass was able to locate and provide the document he claimed to have found on the copier in March 2008 (Attachment B); however he could not locate the incident report. We compared the two documents and discovered that the documents were different in that although they both contained the same swastikas, they had different headers. The document provided to us by Line Supervisor Sass did not contain any of the header information contained on the document submitted by Line Supervisor Totarom. Rather, this document contained the word, "Rims" written in script. Line Supervisor Sass acknowledged that 'Rims' was written in his handwriting. Line Supervisor Sass also provided us with a third rotation sheet (Attachment C). This sheet was identical to Attachment B; however it did not contain any swastikas.

Line Supervisor Sass told Line Supervisor Totarom that he (Sass) was concerned about submitting the document to management with his handwriting on it. Line Supervisor Sass opined that Line Supervisor Totarom altered the document by placing a new header on it before he submitted it to General Superintendent Bruno.

4. Line Supervisor Ganesh Totarom's Second Interview³

Line Supervisor Totarom acknowledged that Line Supervisor Sass indicated that he was concerned about submitting the document with his handwriting on it to management. Line Supervisor Totarom admitted that on Wednesday, at approximately 6:00 p.m., he placed a new header on the document. Line Supervisor Totarom clarified that Line Supervisor Sass provided him with scissors and that Sass was present when he altered the document.

Line Supervisor Sass never told Line Supervisor Totarom that he had previously discovered a document in March 2008 on a copier that contained swastikas.

5. Line Supervisor Gary Sass' Second Interview⁴

Line Supervisor Sass and Line Supervisor Totarom had a discussion about hate groups. During this conversation, Line Supervisor Sass told Line Supervisor Totarom that in March 2008, he had found a document on a copier that contained swastikas, and that he had submitted it to Superintendent Miller, but Miller did nothing about it. According to Line Supervisor Sass, Line Supervisor Totarom opined that management must address that issue.

Line Supervisor Sass admitted that he did not discover a document which contained swastikas on the copier on Friday. Line Supervisor Sass also admitted that he and Line Supervisor Totarom altered (changed headers) the document he alleged to have discovered in March 2008, and that Line Supervisor Totarom submitted it to General Superintendent Bruno.

³ Line Supervisor Totarom was accompanied to his second interview by his union representative.

⁴ Line Supervisor Sass was accompanied to his second interview by his union representative.

6. Superintendent Charlie Miller's Account

Superintendent Miller acknowledged that he had received various incident reports from Line Supervisor Sass concerning employees or depot matters. However, Superintendent Miller denied ever receiving an incident report from Line Supervisor Sass regarding his discovering a document which contained swastikas. Superintendent Miller emphasized that he would have recalled such an event.

Conclusions

Superintendent Miller denied receiving an incident report from Line Supervisor Sass which reported his discovery of a document which contained swastikas. We found Superintendent Miller to be credible. Based on the totality of the investigation, we did not find Line Supervisor Sass to be credible. Of particular note, Line Supervisor Sass was able to locate the original document with the swastikas, but could not locate his incident report with the. Accordingly, we did not substantiate Line Supervisor Sass' claim that in March 2008, he reported to Superintendent Miller that he discovered a document which contained swastikas.

We do not offer an explanation as to how or by whom the swastikas were originally placed on the rotation sheet that Line Supervisor Sass possessed. However, it is clear that Line Supervisor Sass and Line Supervisor Totarom altered a document which contained swastikas, knowing that it would be submitted to management to predicate an investigation into a bias incident. Line Supervisor Sass was fully aware that his allegation that the document was discovered on October 23rd was entirely false. We can not reach a determination as to whether or not Line Supervisor Totarom was aware the document was not discovered on or about October 23rd.

Line Supervisor Totarom made a false report to General Superintendent Bruno on October 28th that he discovered a document containing improper markings. On October 29th, Line Supervisor Sass knowingly made false statements and impeded our investigation when he reported that on October 23rd, he discovered this document on a copier. Line Supervisor Sass ultimately admitted that he lied to investigators regarding when he discovered this document. Line Supervisor Sass also admitted that he and Line Supervisor Totarom fabricated the document.

While Line Supervisor Totarom never claimed to have knowledge that Line Supervisor Sass did not discover the document on October 23rd, he admitted that he intentionally altered this document prior to submitting it to management so that Line Supervisor Sass' handwriting was not on the document.

Line Supervisor Sass claimed that he initiated this false report because he reported a similar incident to Manager Miller in March 2008 which was not investigated. We find this explanation to be remarkable and grossly irresponsible. Swastikas are a widely known symbol of hate. The posting of this symbol on Authority records is grossly inappropriate and offensive, and could be considered a bias crime. Our initial response to College Point Depot was to assist in facilitating the investigation and possibly contacting the local police precinct to report a possible bias crime. If Line Supervisor Sass' concern regarding his claimed initial submission of this document in March 2008 was genuine, he could have inquired with General Superintendent Bruno, or other senior managers within the depot, division or agency, regarding the outcome of any possible investigation. Attempting to resolve this allegedly unresolved matter in this fashion is irrational and unacceptable, and could have resulted in the filing of a false police report. Furthermore, by not providing the proper context of the document, he compromised any possible investigation and could have caused great disruption to depot operations.

Recommendations

1. Take appropriate action with regard to Line Supervisor Sass and Line Supervisor Tatarom.
2. Seek reimbursement for all costs associated with the investigation and administration of this matter from Line Supervisor Sass and Line Supervisor Tatarom.

Please provide me with any comments and actions taken by November 17, 2009.

cc: R. DeVito
B. Brennan
D. Franceschini

Attachments

Attachment A



Bus

FUEL SHEET
DATE _____

9827	9876	9924	9972	7234	7282	3099
9828	9878	9926	9973	7236	7283	3099
9829	9877	9926	9974	7236	7284	3100
9830	9878	9927	9975	7237	7285	3101
9831	9878	9928	9976	7238		3102
9832	9880	9928	9977	7238	3085	3103
9833	9881	9930	9978	7240	3086	3104
9834	9882	9931	9978	7241	3087	3105
9835	9883	9932	9980			
9836	9884	9933	9981			
9837			9982			
9838			9983	7248	3061	3109
9839	9887	9938	9984	7248	3062	3110
9840	9888	9937	9985			
9841	9889	9938	9986			
9842	9890	9939	9987			
9843	9891	9940	9988	7250	3086	3114
9844	9892	9941	9989	7251	3087	3115
9845	9893	9942	9990			
9846	9894	9943	9991			
9847	9895	9944	9992			
9848	9896	9945	9993	7255	3071	3104
9849	9897	9946	9994	7258	3072	3105
9850	9898	9947	9995	7257	3073	3106
9851	9899	9948	9996	7258	3074	3107
9852	9901	9949	9997	7259	3075	3108
9853	9902	9950	9998	7260	3076	3109
9854	9903	9951	9999	7261	3077	3110
9855	9904	9952		7262	3078	3111
9856	9905	9953	9960	7263	3079	3112
9857	9906	9954	9961	7264	3080	3113
9858	9907	9955	9970	7265	3081	3114
9859	9908	9956	9971	7266	3082	3115
9860	9909	9957	9972	7267	3083	3116
9861	9910	9958	9973	7268	3084	3117
9862	9911	9959	9974	7269	3085	3118
9863	9912	9960	9975	7270	3086	3119
9864	9913	9961	9976	7271	3087	3120
9865	9914	9962	9977	7272	3088	3121
9866	9915	9963	9978	7273	3089	3122
9867	9916	9964	9979	7274	3090	
9868	9917	9965	9980	7275	3091	
9869	9918	9966	9981	7276	3092	
9870	9919	9967		7277	3093	
9871	9920	9968	9990	7278	3094	
9872	9921	9969	7291	7279	3095	
9873	9922	9970	7292	7280	3096	
9874	9923	9971	7293	7281	3097	

Page 1 of 1

Attachment B

WORK SHEET, JR:

DATE

9827	9875	9924	9972	7234	7282	3098	
9828	9876	9925	9973	7235	7283	3099	
9829	9877	9926	9974	7236	7284	3100	
9830	9878	9927	9975	7237	7285	3101	
9831	9879	9928	9976	7238		3102	
9832	9880	9929	9977	7239	3055	3103	
9833	9881	9930	9978	7240	3056	3104	Page 1 of 1
9834	9882	9931	9979	7241	3057	3105	
9835	9883	9932	9980			3106	
9836	9884	9933	9981			3107	
9837	9885	9934	9982			3108	
9838	9886	9935	9983	7245	3061	3109	
9839	9887	9936	9984	7246	3062	3110	
9840	9888	9937	9985			3111	
9841	9889	9938	9986			3112	
9842	9890	9939	9987	7247		3113	
9843	9891	9940	9988	7248	3065	3114	
9844	9892	9941	9989	7249	3066	3115	
9845	9893	9942	9990			3116	
9846	9894	9943	9991			3117	
9847	9895	9944	9992			3118	
9848	9896	9945	9993	7255	3071	3119	
9849	9897	9946	9994	7256	3072	3120	
9850	9898	9947	9995	7257	3073	3121	
9851	9899	9948	9996	7258	3074	3122	
9852	9900	9949	9997	7259	3075	3123	
9853	9901	9950	9998	7260	3076	3124	
9854	9902	9951	9999	7261	3077	3125	
9855	9903	9952		7262	3078	3126	
9856	9904	9953	9950	7263	3079	3127	
9857	9905	9954	9951	7264	3080	3128	
9858	9906	9955	9952	7265	3081	3129	
9859	9907	9956	9953	7266	3082	3130	
9860	9908	9957	9954	7267	3083	3131	
9861	9909	9958	9955	7268	3084	3132	
9862	9910	9959	9956	7269	3085	3133	
9863	9911	9960	9957	7270	3086	3134	
9864	9912	9961	9958	7271	3087	3135	
9865	9913	9962	9959	7272	3088	3136	
9866	9914	9963	9960	7273	3089	3137	
9867	9915	9964	9961	7274	3090	3138	
9868	9916	9965	9962	7275	3091	3139	
9869	9917	9966	9963	7276	3092	3140	
9870	9918	9967	9964	7277	3093	3141	
9871	9919	9968	9965	7278	3094	3142	
9872	9920	9969	9966	7279	3095	3143	
9873	9921	9970	9967	7280	3096	3144	
9874	9922	9971	9968	7281	3097	3145	21/20

<http://hubpages.com/u/261971260304>

Exhibit L

Attachment C

WORKSHEET - JR.

DATE

9827	9875	9924	9972	7234	7282	3098
9828	9876	9925	9973	7235	7283	3099
9829	9877	9926	9974	7236	7284	3100
9830	9878	9927	9975	7237	7285	3101
9831	9879	9928	9976	7238		3102
9832	9880	9929	9977	7239	3055	3103
9833	9881	9930	9978	7240	3056	3104
9834	9882	9931	9979	7241	3057	3105
9835	9883	9932	9980	7242	3058	3106
9836	9884	9933	9981	7243	3059	3107
9837	9885	9934	9982	7244	3060	3108
9838	9886	9935	9983	7245	3061	3109
9839	9887	9936	9984	7246	3062	3110
9840	9888	9937	9985	7247	3063	3111
9841	9889	9938	9986	7248	3064	3112
9842	9890	9939	9987	7249	3065	3113
9843	9891	9940	9988	7250	3066	3114
9844	9892	9941	9989	7251	3067	3115
9845	9893	9942	9990	7252	3068	3116
9846	9894	9943	9991	7253	3069	3117
9847	9895	9944	9992	7254	3070	3118
9848	9896	9945	9993	7255	3071	3119
9849	9897	9946	9994	7256	3072	3120
9850	9898	9947	9995	7257	3073	3121
9851	9899	9948	9996	7258	3074	3122
9852	9900	9949	9997	7259	3075	3123
9853	9901	9950	9998	7260	3076	3124
9854	9902	9951	9999	7261	3077	3125
9855	9903	9952		7262	3078	3126
9856	9904	9953	9999	7263	3079	3127
9857	9905	9954	9999	7264	3080	3128
9858	9906	9955	9999	7265	3081	3129
9859	9907	9956	9999	7266	3082	3130
9860	9908	9957	9999	7267	3083	3131
9861	9909	9958	9999	7268	3084	3132
9862	9910	9959	9999	7269	3085	3133
9863	9911	9960	9999	7270	3086	3134
9864	9912	9961	9999	7271	3087	3135
9865	9913	9962	9999	7272	3088	3136
9866	9914	9963	9999	7273	3089	3137
9867	9915	9964	9999	7274	3090	3138
9868	9916	9965	9999	7275	3091	3139
9869	9917	9966	9999	7276	3092	3140
9870	9918	9967	9999	7277	3093	3141
9871	9919	9968	9999	7278	3094	3142
9872	9920	9969	9999	7279	3095	3143
9873	9921	9970	9999	7280	3096	3144
9874	9922	9971	9999	7281	3097	3145